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Nos. 92-484, 92-507

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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UNITED STATES NATIONAL BANK OF OREGON,
*Petitioner,*

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
*Respondents.*

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STEPHEN L. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
*Petitioners,*

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the text of the Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752, rebuts the presumption of invalidity created by the omission of Section 92 of the National Bank Act from the U.S. Code, where the punctuation and structure of the 1916 Act indisputably indicates that Section 92 was repealed by Section 20 of the War Finance Corporation Act of 1918, ch. 45, 40 Stat. 512.

2. Whether the Court of Appeals should have addressed the question of Section 92's validity, where the parties disputed whether the court should reach the issue, where all interested parties were given an opportunity to brief and argue the issue, and where the underlying dispute turned on the proper interpretation of Section 92.

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## BRIEF IN OPPOSITION

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This brief is submitted by respondents Independent Insurance Agents of America, Inc., Independent Insurance Agents of Oregon, National Association of Life Underwriters, National Association of Professional Insurance Agents, National Association of Surety and Bond Producers, Oregon Association of Life Underwriters, and Oregon Professional Insurance Agents, Inc., in opposition

to the petitions for writ of certiorari filed by the Acting Comptroller of the Currency ("Comptroller"), the Office of the Comptroller of the Currency, and the United States in Case No. 92-507, and by the United States National Bank of Oregon ("Oregon National Bank" or the "Bank") in Case No. 92-484.[1]

## STATEMENT OF THE CASE

The Petitions for Certiorari in this case present narrow questions involving application of well-settled principles of federal law. The impact of the decision below is minimal, at most, and this Court's plenary review would not offer any meaningful instruction or direction to lower federal courts. Accordingly, no reason exists for review by this Court.

### A. Statutory and Regulatory Framework

To protect the integrity of the banking system, prevent unfair competition, and safeguard the public, national banks and federally-registered bank holding companies are generally prohibited from engaging in the business of insurance. Section 24 of the National Bank Act ("NBA"), 12 U.S.C. § 24(Seventh), which sets forth the powers of national banks, has been consistently interpreted as strictly limiting the permissible insurance activities of national banks. The Bank Holding Company Act ("BHCA") similarly prohibits the general sale of insurance by bank holding companies. 12 U.S.C. § 1843(c)(8).[2]

In 1916, at the behest of then-Comptroller John Skelton Williams, Congress enacted a narrow exception to provide

[1] Pursuant to this Court's Rule 29.1, Respondents state that they have no publicly traded parent companies or subsidiaries.

[2] Section 1843 prohibits bank holding companies from engaging in business not closely related to banking, and subsection (c)(8) makes clear that "it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal or broker" except in limited circumstances.



a modicum of financial assistance to "country bank[s]." The exception was codified as Section 92 of the NBA, and provided that a national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life or other insurance company." As Comptroller Williams explained in urging adoption of Section 92, "many banks located in small country communities" had experienced financial difficulties. 53 Cong. Rec. S11001 (daily ed. July 14, 1916). Empowering such country banks to sell insurance would assist these "small national banks" by "provid[ing] them with additional sources of revenue," and would thereby ensure that inhabitants of sparsely populated areas had access to banking services. *Id.*

Comptroller Williams went on to make clear, however, that the authority to sell insurance would be "limited to banks in small communities." *Id.* He also made clear that country banks should be permitted to sell insurance only in their local communities, for then their insurance activities would not be "likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.* He warned that it would be unwise policy to confer a broader power "generally upon banks in the large cities" to sell insurance, and that "it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores" offering a variety of banking and nonbanking products. *Id.*

### B. The Proceedings Below

Oregon National Bank is a national banking association with its principal place of business in Portland, Oregon. It is anything but a "country bank." In 1990, it was the forty-fourth largest bank in the nation. Its parent bank holding company, U.S. Bancorp, had assets of more than $7.0 billion in 1986. American Banker, Jan. 20, 1987 at 30.

In 1984, the Bank proposed to establish a wholly owned, *de novo* subsidiary for the purpose of offering a full range of insurance products from an office located in a community with a population of less than 5,000. But the Bank did not propose to restrict insurance sales to the environs of that small town. To the contrary, it sought approval for a nationwide insurance business.

In August, 1986, the Comptroller approved Oregon National Bank's proposal. The Comptroller concluded that, pursuant to Section 92, "a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers *located anywhere*." (OCC Pet. App. 75a) (emphasis added). Respondents challenged the Comptroller's ruling, arguing that Section 92 could not be read to empower a national bank to sell insurance outside the small town in which its office was located.[3]

Echoing a point made by Respondents in their summary judgment briefs, the district court noted that Section 92 "no longer appears in the United States Code," and concluded that the statutory provision "apparently was inadvertently repealed in 1918." (OCC Pet. App. 44a n.2.) Despite this conclusion, the court "assume[d] that the statute exists *in proprio vigore*." *Id.* The district court went on to determine, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that Congress did not specifically intend to preclude the nationwide sale of insurance from any bank office located in a town of fewer than 5,000 inhabitants, and that the Comptroller's action should therefore be affirmed because it was not inconsistent with the purposes of Section 92.

**C. Proceedings Before the Court of Appeals**

After briefing and oral argument on the issue, the majority of a panel of the D.C. Circuit reversed, concluding that Section 92 "has been repealed" and "has ceased to exist." (OCC Pet. App. 19a.)[4] In reaching its conclusion, the Court of Appeals carefully examined the text of the relevant statutory provisions, including punctuation, as well as relevant legislative history.

[3] The Oregon National Bank intervened as a defendant.



The Court of Appeals first addressed the issue whether it should decide Section 92's validity. The court observed that it is well-recognized that courts must sometimes go beyond the specific legal theories advanced by the parties. (OCC Pet. App. 5a, citing, *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991) ("court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"); *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415 (1990); *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939)). Observing that Section 92's omission from the U.S. Code gives rise to a statutory presumption of invalidity, 1 U.S.C. § 204(a), the court concluded that it "not only [had] the right to inquire into its validity, [it had] the duty to do so." (OCC Pet. App. 6a.)

The Court of Appeals carefully examined the text of the Statutes at Large to determine whether they rebut the statutory presumption of Section 92's repeal. From the Petitioners' view, the question before the court was

[4] The Court's ruling could not have been a surprise to the parties or the banking and insurance industries. Prior to oral argument, the Court of Appeals ordered the parties to be prepared to address Section 92's continued existence. There was extensive questioning on the issue during argument on March 1, 1991. Thereafter, in August 1991, the court ordered the parties to submit post-argument briefs addressing two questions: (1) whether the court should address the question of Section 92's validity; and (2) whether Section 92 continues to exist. Although the Comptroller argued, in response, that the Court should not reach the issue, Respondents maintained that the Court *must* resolve the question of Section 92's validity. All these proceedings were public.

whether Congress had made Section 92 a part of Section 13 of the Federal Reserve Act or whether it became part of Section 5202 of the Revised Statutes. Examining the text, including the punctuation, of Pub. L. No. 64-270, 39 Stat. 752, 753 (1916) (the "1916 Act"), the Court of Appeals concluded that, "on its face, the 1916 [Act] had the effect of placing section 92 within section 5202 of the Revised Statutes." (OCC Pet. App. 9a)

The court then turned to the War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) (the "1918 Act"). The language of the 1918 Act, which states that it *amends* R.S. 5202 "to read as follows," omits the paragraph now known as Section 92. The court explained that "[u]nder traditional rules of statutory construction, the meaning of Section 92's omission is plain; the material omitted on reenactment is deemed repealed." (OCC Pet. App. 9a (citing cases))

After noting that post-1918 views regarding whether Section 92 had been repealed were not unanimous, the Court of Appeals focussed on evidence as to what Congress understood it was doing in recodifying R.S. 5202 in the 1918 Act. The court noted that three extant sources as to current law at the time reported that, as a result of the 1916 Act, Section 92 was part of R.S. 5202, and therefore informed the 1918 Congress that Section 92's exclusion from the amended R.S. 5202 in the 1918 Act would signal its repeal. (OCC Pet. App. 13a) Recognizing that the purpose of the 1918 Act was to assist the financing of the war effort, the court observed that "there is no inherent contradiction between the deletion of section 92 and [that purpose]." (*Id.* 14a)

The court ruled that subsequent treatment of Section 92 by Congress did not determine whether the 1918 Congress had repealed the provision. (*Id.* 15a, citing *Russello v. United States*, 464 U.S. 16, 26 (1983) ("[I]t is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")) Further, the court concluded, "[f]ederal agencies have no authority to reinstate a statute that Congress has repealed." And no prior court had found that Section 92 remains valid; at most, they had merely presumed that it does. (OCC Pet. App. 15a-18a)



Finally, the Court of Appeals declined the invitation to rewrite history:

> It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

(*Id.* 19a-20a)[5]

Judge Silberman, dissenting, did not take issue with the majority's conclusion that Section 92 had been repealed. Instead, he disagreed with the court's decision to reach the issue, concluding that Respondents' failure to challenge Section 92's validity was the end of the matter. Judge Silberman did *not* assert that the court was without power to address the issue, but rather that it should have refrained from doing so as matter of "judicial restraint." (*Id.* at 32a) Although representatives from the insurance and banking industries, as well as the government, had participated in the case as parties or *amici* and the court had repeatedly raised the question of Section 92's validity prior to issuing its decision,[6] Judge

[5] Quoting the court's opinion out of context, the Solicitor General suggests that the Court of Appeals concluded that Congress had, in fact, made a mistake when it repealed Section 92. *See* OCC Pet. 7, citing App. 14a. The court drew no such conclusion. To the contrary, it found that it "must conclude that Congress intended the consequences of its actions." (OCC Pet. App. 19a)

[6] The American Bankers Association, a trade association which purports to represent "both national and state-chartered banks located in each of the fifty states and the District of Columbia," participated in the appeal as *amicus curiae*. Brief of the American

Silberman inexplicably seemed concerned that interested parties "had no opportunity to make their views known to the court." (*Id.* 33a).

Petitioners sought rehearing, or rehearing *en banc*, raising the same issues and arguments they repeat here. The full court received briefing on both of the questions presented to this Court. No member of the Court of Appeals voted to reconsider the majority's conclusion that Section 92 had been repealed. Judge Silberman, joined by two other judges, voted to reconsider only whether the court should have reached the question—an issue raised (both at the *en banc* stage and in this Court) by the Bank, but not by the Comptroller. Three judges wrote separately to disagree with Judge Silberman.

## REASONS FOR DENYING THE WRITS

The Solicitor General, on behalf of the Comptroller, seeks review of the D.C. Circuit's holding that Section 92 has been repealed. The Oregon National Bank adds a second issue: whether the Court of Appeals should have considered the validity of Section 92. The Solicitor General expressly urges this Court *not* to address this second issue. OCC Pet. 9 n.3. No reason exists for granting certiorari on either question.

1. a. There is no meaningful conflict between the Circuits on the issue of Section 92's continued existence. In *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992) ("*ALTA*") (petitions pending), the Second Circuit unanimously held that national banks are not empowered by the NBA to act as agents for insurance companies in the sale of title insurance. The court ruled

Bankers Association and Oregon Bankers Association as Amici Curiae at 3 (filed Feb. 7, 1991). *See also supra* n.4.

[7] Judge Randolph also wrote separately to express his view that "denials of rehearing *en banc* are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases." (OCC Pet. App. 42a)



that Section 92 limits national banks' "incidental powers" under Section 24(Seventh) of the NBA. Without having received briefing or hearing argument on the issue, the Second Circuit, as a preliminary point, *sua sponte* concluded that Section 92 had not been repealed. That conclusion, however, was *dicta*: the court need *not* have resolved the issue of Section 92's continued existence in order to conclude that national banks lack the power to act as agents for title insurance companies.

As the Fifth Circuit has recognized, prior to enactment of Section 92, "no national bank possessed *any* power to act as insurance agents." *Saxon v. Georgia Ass'n of Ind. Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968) (emphasis in original). By its explicit *addition* to national banks' powers, Section 92 constituted the sole source of authority for national banks to engage in insurance-agency activities.[8] Section 92 was thought necessary precisely for the reason that, as was universally understood, national banks otherwise had neither the express nor incidental power to sell insurance. *See, e.g.*, 53 Cong. Rec. S11001 (daily ed. July 14, 1916) ("[N]ational banks are not given either expressly or by necessary implication the power to act as agents for insurance companies.").[9] Section 92 thus reflects Congress' understanding that insurance powers were beyond the

[8] *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."); *National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 458 (1974) (same); *Midland Telecasting v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir.) ("The existence of a specific [statutory] exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions."), *cert. denied*, 449 U.S. 954 (1980).

[9] This view conformed with the opinion of the Board of Governors of the Federal Reserve, which held in 1915 that national banks had no authority, express or implied, to engage in insurance agency activities. The Board ruled that "[a]ny such *extension* of the powers of national banks must be left to the consideration of Congress." 2 Fed. Reg. Bull. 73, 74 (Feb. 1, 1916) (emphasis added).

powers conveyed by the other provisions of the NBA. *See Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 258 & n.13 (1934) (amendment to NBA to provide limited power to pledge assets to secure deposits "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits"). The Second Circuit expressly embraced this understanding of the NBA. *ALTA*, 968 F.2d at 155.

Section 92 is thus the only statutory enactment that has ever addressed the insurance agency powers of national banks. The effect of Congress' repeal of Section 92 is thus plain: there is no longer *any* authority for national banks to sell insurance. The repeal of Section 92 reinforces Congress' intention to deprive national banks of even the limited authority to sell insurance in small towns that it briefly permitted from 1916 to 1918. Congress thus reinstated the law as it existed prior to Section 92's enactment: "no national bank possesse[s] *any* power to act as insurance agents." *Saxon*, 399 F.2d at 1016 (emphasis in original).

This background demonstrates why the Second Circuit's view is *dicta*. Whether or not Section 92 now exists, its enactment in 1916 demonstrates that national banks do not possess any general power to sell insurance, including title insurance. For that reason, there was no necessity for the Second Circuit to decide whether Section 92 had been repealed. And, for this same reason, but contrary to the Comptroller's assertion, the issue of Section 92's existence does *not* have "ramifications" for the *ALTA* decision (OCC Pet. 20): even if this Court were to grant review and determine that the Second Circuit incorrectly ruled on Section 92's continued existence, that determination would not alter the outcome in *ALTA*. *See Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

The lack of any meaningful conflict is demonstrated by the fact that the Second Circuit's *dicta* and the D.C. Circuit's ruling below do not create conflicting obligations or rights for any entity. The D.C. Circuit held that Section 92 no longer exists. Because the Comptroller had cited no other authority for its challenged ruling, the Court of Appeals concluded that the agency's ruling was not in accordance with law. (OCC Pet. App. 20a) That is, the D.C. Circuit held that the Comptroller cannot invoke Section 92 as a source of authority to permit national banks to sell insurance from "small towns." By contrast, the *ALTA* decision presents and addresses only the narrow issue of national banks' authority to sell title insurance without regard to their geographic location. The Second Circuit held that the Comptroller cannot invoke Section 24(Seventh) as a source of authority to permit national banks to sell title insurance from offices that are not located in small towns. The *ALTA* court did *not* give any instruction as to the use or application of Section 92. Thus, neither the Comptroller, the Bank, nor any other entity is subject to conflicting directives from or accorded different rights by the two courts.

Moreover, the Second Circuit and D.C. Circuit actually *agree* on the one issue Petitioners contend controls: whether Section 92 was placed in Section 5202 of the Revised Statutes in 1916 (in which case it was repealed in 1918) or whether it was placed in Section 13 of the Federal Reserve Act. (OCC Pet. 11, Bank Pet. 11)[10] The D.C. Circuit, as noted, held that Section 92 *was* part of R.S. 5202 and therefore was repealed by the 1918 Act. The Second Circuit also concluded that "Congress enacted Section 92 as part of Section 5202 of the Revised Statutes." (Bank Pet. at 18 n.24, citing *ALTA*, 968 F.2d at 151) The two Circuits thus agree on the controlling question presented to this Court by Petitioners.

The Second Circuit went on to conclude, contrary to the view of all of the parties here, that the 1916 version

[10] According to Petitioners, if Section 92 was not part of R.S. 5202, there was no repeal in the 1918 Act. *Id.*

of Section 5202 somehow survived its amendment and recodification in 1918. The fact that even the Petitioners cannot support such erroneous *dicta* merely underscores the conclusion that the Second Circuit's review of Section 92 is an aberrant departure from settled legal principles that lacks any concrete effect.[11]

b. Without any meaningful conflict, Petitioners resort to asking this Court to sit as a court of error and correct what they view to be the D.C. Circuit's erroneous decision. Not only have they miscast the role of this Court, *see Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), but this case does not warrant this Court's attention: the legal issues presented are arcane and the case does not have any significant impact on the banking or insurance industry. Moreover, Petitioners' arguments lack merit. The text of the relevant Statutes at Large—including its punctuation—demonstrates that the 1918 Congress repealed Section 92. Nothing in the legislative history negates this conclusion, and subsequent actions have not revived the dead statute.

As noted above, the Petitioners expressly disavow the Second Circuit's reasoning in *ALTA*. (OCC Pet. 11; Bank Pet. 18 n.24) Instead, they fashion a new argument for Section 92's existence—an argument that *no* judge has accepted, and that did not persuade the D.C. Circuit, sitting *en banc*, of the need ever to give the panel's decision a second look.

Petitioners do not contest the Court of Appeals' determination that Section 92's absence from the U.S. Code creates a presumption that the statutory provision no

[11] Petitioners note that a district court in Kentucky has adopted the Second Circuit's *dicta*. *See Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D. Ky. Aug. 4, 1992) (appeals pending). But that case is no cause for granting review here. The question of Section 92's validity is one of the issues raised on appeal and the Sixth Circuit may agree with the D.C. Circuit's holding in this case. If anything, the existence of the Sixth Circuit litigation is an additional reason why action of this Court is not now required.



longer exists. *See United States v. Bergh*, 352 U.S. 40, 47 (1956) (exclusion of statutory provision from Code is evidence of repeal). Congress itself has directed that the U.S. Code "establishe[s] prima facie the laws of the United States." 1 U.S.C. 204(a). Nor do Petitioners argue that the court incorrectly looked to the Statutes at Large to determine whether they contradict the U.S. Code.[12] Rather, they contend that the court misconstrued the evidence to be gleaned from the Statutes at Large. This is not the proper time or place to argue fully the merits of the case, but several of Petitioners' arguments warrant response.

*First*, as the Solicitor General concedes, the punctuation of the Statutes at Large unambiguously indicates that Section 92 was part of R.S. 5202 and was repealed in 1918.[13] (OCC Pet. 11) Nevertheless, Petitioners argue that the punctuation of the Statutes at Large should be ignored in favor of what they believe to be the contrary import of the "text" of the 1916 Act. But the text will not bear the strained reading Petitioners would force upon it. In fact, the text is consistent with the reading necessarily drawn from the punctuation.

*Second*, Petitioners make much of the fact that the paragraph preceding Section 92 in the 1916 Act relates to "acceptances authorized by *this Act*," 39 Stat. 753 (emphasis added), asserting that it must mean the Federal Reserve Act and not R.S. 5202. This construction, according to Petitioners, suggests that the 1916 Act placed the paragraph preceding Section 92 (and therefore Sec-

[12] Congress has stipulated that "[t]he United States Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States." 1 U.S.C. § 112. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

[13] The Court of Appeals' analysis of the punctuation and the statutory phrase "amended to read as follows" in the 1918 Act is precisely the same as the analysis employed by this Court in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958). *Compare Vance v. Safeway Stores*, 239 F.2d 144, 146 (10th Cir. 1956), *rev'd* 355 U.S. 389 (1958) (relying on *Nashville Milk*).

tion 92 itself) in the Federal Reserve Act and not in R.S. 5202. They seek support for this conclusion in the paragraph that clearly pertains to R.S. 5202 (indeed, restates R.S. 5202 as it existed at the time), which cross-references the "Federal Reserve Act." According to Petitioners, this cross-reference means that this first paragraph alone was meant to be in R.S. 5202, whereas the following paragraphs (including Section 92) were meant to be part of Section 13. (*See* OCC Pet. 11-13; Bank Pet. 11-13)

But that first paragraph's explicit identification of the Federal Reserve Act explains why Congress could use the phrase "this Act" in the next paragraph to refer to the Act just named—*i.e.*, the Federal Reserve Act. Because the "Federal Reserve Act" was mentioned in the first paragraph, the use of the phrase "this Act" in the next paragraph could serve simply as an antecedent reference. There would be no confusion in the text as it appeared in R.S. 5202: "this Act" refers to the previously identified Federal Reserve Act, just as Petitioners contend it must.[14]

There is, of course, another possible explanation Petitioners ignore. The phrase "this Act" in the paragraph preceding Section 92 may refer to nothing other than the 1916 Act itself.[15] If that was Congress' intent, then the reference to "this Act" has no relevance to where the paragraph was meant to be inserted. Wherever it was inserted—in R.S. 5202 or the Federal Reserve Act or any

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[14] The Solicitor General wrongly argues that Congress would have to use the phrase "that Act" to refer to the previously mentioned Federal Reserve Act. OCC Pet. 13 n.6. In fact, the word "this" would correctly refer to the prior reference. "This" means "the . . . thing, or idea . . . that has just been mentioned." Webster's Ninth New Collegiate Dictionary 1227 (ed. 1988). That the Solicitor General's argument turns on the difference between "this" and "that" highlights the paucity of Petitioners' contention that the text rebuts the presumption of Section 92's repeal.

[15] The paragraph preceding Section 92 refers to "acceptances authorized by this Act." The 1916 Act revised the acceptances authorized pursuant to the Federal Reserve Act of 1913, Pub. L. No. 63-43 § 13, 38 Stat. 251 ("1913 Act").



other statute—"this Act" would simply refer back to the 1916 Act, Pub. L. No. 64-270. It would still accomplish the same referentional significance Petitioners contend it must.

*Third*, Petitioners' reading of the text does violence to the express statutory language. In the 1916 Act, Congress stated, in no uncertain terms, that "Section [5202] of the Revised Statutes of the United States is hereby amended to read as follows." Yet, according to Petitioners, Congress simply restated R.S. 5202 as it existed pursuant to the 1913 Act. *See* OCC Pet. 13 n.7 (arguing that the title "nowhere suggests that the [1916 Act] was adding matter to Rev. Stat. § 5202").[16] That reading, which requires that the express instruction given by Congress (that R.S. 5202 is "amended") be entirely ignored, violates the most fundamental tenets of statutory construction. *E.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The text demonstrates that the 1916 Congress *did* amend R.S. 5202, in part, by adding Section 92.

*Fourth*, the structure of the 1916 Act—which Petitioners ignore—further supports the conclusion that Congress made Section 92 part of R.S. 5202. There are several introductory sentences within the 1916 Act that unquestionably were not intended to become positive law. Instead, they act as signposts, explaining where the 1916 amendments are to be inserted in previously-existing law. As they appear in text, these introductory phrases are as follows (numbering is added):

> (1) At the end of section eleven insert a new clause as follows: . . .
>
> (2) That section thirteen be, and is hereby, amended to read as follows: . . .

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[16] "That the heading of [statute] fails to refer to all the matters which the framers of that section wrote into text is not an unusual fact." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947). The title cannot override "the detailed provisions of the text." *Id.*

(3) Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: . . .

(4) That subsection (e) of section fourteen, be, and is hereby, amended to read as follows: . . .

The language of Section 92 comes after (3), addressing amendments to R.S. 5202, and precedes (4), the next introductory phrase.

In sum, the text, even without quotation marks, demonstrates that Section 92 was enacted as part of R.S. 5202. The quotation marks, as they appear in the Statutes at Large, simply clarify the meaning of these introductory phrases.[17]

c. Contrary to Petitioners' suggestions, the Court of Appeals was the first court to address the issue of Section 92's existence. *See* Bank Pet. 9. Courts—including this Court—have, at most, noted Section 92's absence

[17] At the time Congress enacted the 1918 Act, *every* extant source for current statute law that has been identified included Section 92 in Section 5202 of the Revised Statutes. Petitioners note that the court overlooked one source of current banking law that presumably was available to Congress in 1918—the Comptroller compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks," published by the Senate Committee on Banking and Currency. The Comptroller compilation twice set forth the text of Section 92. *First*, the text was unequivocally placed in Section 5202. S. Doc. No. 412, 64th Cong., 1st Sess. 83-84 (1917). *Second*, the compilation reproduced the language of the 1916 Act, containing both Section 13 and Section 5202. *Id.* at 136-37. Thus, no matter which section of the compilation a congressional representative consulted, he or she would have seen Section 92 as part of R.S. 5202. And any ambiguity about the placement of Section 92 in the second reference would be settled by the precision of the first reference.

Petitioners incorrectly contend that the Federal Reserve Board's 1917 compilation of banking statutes set forth Section 92 as part of the Federal Reserve Act. The *Third Annual Report of the Federal Reserve Board* simply restated the 1916 Act, including quotation marks, as it appears in the Statutes at Large. Therefore, like the text of the Statutes at Large, it places Section 92 within R.S. 5202.



from the U.S. Code, but simply "assumed" its existence, avoiding resolution of the issue. *Commissioner of Internal Revenue v. First Sec. Bank*, 405 U.S. 394, 401-02 & n.12 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 & n.6 (5th Cir. 1980); *Commissioner of Internal Revenue v. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966). Other courts appear to have implicitly assumed it exists. *E.g., Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468, 467-77 (8th Cir. 1984); *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 835 F.2d 1452, 1456 n.8 (D.C. Cir. 1987). Petitioners do not assert that any of these courts would have decided the cases before them differently had they not made this assumption. Indeed, as the Court of Appeals correctly determined, the Court's decision in *Commissioner v. First Sec. Bank*, "did not depend on the statute's continued validity" (OCC Pet. App. 16a), and "[a] determination of the validity of section 92 was not necessary to its decision." (*Id.* 18a) Thus, the D.C. Circuit's ruling has no implications for this Court's previous ruling.

Moreover, Petitioners overstate the concurrence with their position. *See* Bank Pet. 9. The actions of subsequent Congresses have suggested that they were of mixed views—or ambivalent—as to whether Section 92 was repealed in 1918. Consistent with the Court of Appeals' analysis, Congressman Patman, a member (and future Chairman) of the House Banking Committee, argued in 1957 that Section 92 had been repealed.[18] This prompted submissions to the Committee from the Comptroller, general counsel of the Committee, and the Library of Congress' Legislative Reference Service.[19] After receiving these views, however, the House Committee offered no

[18] *Financial Institutions Act of 1957, Hearings Before the Comm. on Banking and Currency, House of Representatives, on S. 1451 and H.R. 7206*, 85th Cong., 2d Sess. 989-90, 1060-63 (1958).

[19] *Id.* at 1036-40, 1063-71.

judgment on Section 92's validity.[20] Seven years later, the staff of a House Banking subcommittee reached the conclusion that "Section 92 is non-existent."[21] In 1988, the Senate passed a bill amending the NBA and including a new section that would have duplicated Section 92 with more explicit limitations. But the bill made no reference to Section 92 or provision for its amendment, replacement or repeal, thus suggesting the view that Section 92 was not in effect.[22]

Of course, these later Congresses could not reinstate a statute repealed by a prior Congress without positively enacting it into law. As Judge Sentelle correctly observed:

> The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. . . .

OCC Pet. App. 37a (concurring in denial of rehearing *en banc*). No post-1918 Congress reenacted Section 92.

d. The Court of Appeals' decision does not present an issue of such substantial practical importance to the nation's banking or insurance industry to warrant this Court's review. Its real practical impact will be felt by few, if any, national banks and, even then, most such banks will have an easily available alternative means through which to sell insurance in small towns.

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[20] *See id.* at 1090, 1199.

[21] *Consolidation of Bank Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance*, 89th Cong., 1st Sess. 3, 391 (1965).

[22] The Proxmire Financial Modernization Act of 1988, Section 513B, reprinted in 134 Cong. Rec. S3541 (daily ed. March 31, 1988).



*First*, relatively few national banks *could* actually be affected by the court's decision. No one has offered a firm number of the national banks selling general insurance pursuant to Section 92. What numbers have been proffered have been *decreasing* dramatically. The American Bankers Association ("ABA") represented before the Court of Appeals that there were some 160 national banks; and the Comptroller estimated that there were 179 earlier this year. *See* OCC Pet. 19 n.11; Bank Pet. 10. Now, the Comptroller maintains that the number is between 90 and 100. OCC Pet. 19 n.11. None of these numbers has been substantiated. Even taking the unsupported figures at face value, the percentage of national banks using Section 92 is extremely small—between 2.6 and 4.1 percent.[23] According to the ABA, they operate in only sixteen States.[24] And there has never been any allegation, let alone showing, that insurance represents a significant source of income for any of these banks.

*Second*, a great majority of the few potentially affected national banks have an easy alternative at hand; indeed, some may not be relying on Section 92 for their insurance-agency activities at all. Many national banks—including the Oregon National Bank and the three national bank plaintiffs in *Owensboro*—are owned by bank holding companies and the remaining have the power to form a bank holding company.[25] A bank holding com-

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[23] *See* Thompson Bank Directory 15 (Jan.-June 1992) (number of national banks in United States is 3,888). Thompson Financial Publishing is the official numbering agent for the American Bankers Association.

[24] Appellants' Opposition to Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc, Exhibit 1 (filed April 20, 1992).

[25] Thompson Bank Directory 15, 154 (8,288 of 12,447 banks are part of holding company structures). Every State has resident bank holding companies. *Id.*

pany is enpowered to operate a nonbanking subsidiary that sells insurance in a small town with a population not exceeding 5,000, so long as state law concurs. 12 U.S.C. §§ 1843(c)(8)(C)(i), 1846. According to the ABA's own figures, most, if not all, of the national banks that are purportedly using Section 92 are located in States where the small-town provision of the BHCA can be used.[26] The Comptroller while noting that Respondents made this point in successfully opposing *en banc* rehearing, does not disagree that the BHCA is an easily accessible alternative source of small-town insurance-agency activity for national banks, including those currently selling general insurance. OCC Pet. 19 n.12.[27]

*Third*, the Bank's—but notably *not* the Solicitor General's—reliance on state "parity" or "wild card" statutes is inappropriate. Bank Pet. 10. These statutory provisions may demonstrate nothing more than a desire to ensure that state banks have competitive equality with national banks, in which case the disappearance of Section

[26] There is a difference between the BHCA small-town provision and Section 92 as interpreted by the Comptroller. The BHCA permits the sale of insurance only to customers located in small town and its environs. *See First United Bancshares, Inc.*, 73 Fed. Res. Bull. 162 (1987). Section 92, on the other hand, has been interpreted by the Comptroller to allow the sale of insurance to customers located anywhere. It is this disparity that triggered the instant litigation. It is significant to note, however, that no evidence has been presented in this case that any bank other than Oregon National Bank is engaged in geographically widespread sales through use of Section 92.

[27] Even without the BHCA, these banks are not left without some prospect of alternative federal source of insurance-agency authority. For example, the Comptroller has interpreted Section 24(Seventh) of the NBA to permit national banks to insure the issuance of municipal bonds on the grounds that the activity is functionally "within the business of banking." *E.g., American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988). In addition, the Comptroller has permitted national banks to enter into other arrangements with insurance agencies, such as leasing bank lobby space. The permissibility of such rulings is, of course, not before this Court.



92 would not infringe upon any state goal. In any event, it is within the easy power of state legislatures, or perhaps even state regulators, to create their own small-town exemption if they wish to ensure continuation of such activity by their state-chartered banks. Indeed, a number of States have done just that.[28]

The Bank asserts only that the decision below "calls into question" (Bank Pet. 8) or "creates considerable uncertainty over the propriety of" banks' small-town insurance agency activities (Bank Pet. 10). The Solicitor General contends only that the decision "does violence to the settled expectations of those banks that currently sell insurance under Section 92." OCC Pet. 19. Noticeably absent from either Petition is an assertion that the decision will require national banks to cease this insurance agency activity. Petitioners cannot have it both ways: either the decision below forces national banks to cease their sale of general insurance or it has no practical impact.

e. This case presents an extremely unusual question of statutory construction. It is highly unlikely that any court will again face a circumstance in which a statute has been eliminated from the U.S. Code; the original statutory text (including its punctuation) and subsequent congressional action indicate that the statute was repealed; but it has nonetheless been assumed (at least by some), without the issue having been decided, that the statute continues to exist. It is highly unlikely therefore that this Court's exercise in following the trail of quotation marks Petitioners lay and parsing the textual

[28] *E.g.*, N.M. Stat. Ann. § 59A-12-10A(2)(1991); Wash. Rev. Code § 30.08.140(10) (1990); Colo. Rev. Stat. § 10-2-211(2)(b) (1991). This option is particularly attractive in these circumstances because, by the APA's reckoning, 105 of the 115 specifically identified state banks are located in just one State, which could solve this "problem" on its own. *See* n.24 *supra*.

nuances of "this" versus "that," as Petitioners urge, would offer any meaningful instruction or direction to other courts.[29]

If the decision is incorrect and if the decision proves to have a substantial negative impact on the banking and/or insurance industries in the future, Congress is free to address the matter. The proper branch of government to fill gaps created by repeals—whether inadvertent or not—is the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37 (1940); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982) (Congress closed "loophole" created by earlier "inadvertent[] repeal"). If the deletion of Section 92 was a "mistake," it is for Congress—not the courts—to correct. *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364-65 (1986).

2. Petitioner Oregon National Bank stands alone in asking this Court to review whether the Court of Appeals should have addressed the question of Section 92's validity. But the Bank has pointed to no decision in conflict with the opinion below, and none exists. Nor does this case present any important or unresolved question of federal law relevant to this issue.

Contrary to the Bank's contention, the Court of Appeals' determination of the validity of Section 92 was anything but "*sua sponte*." Bank Pet. 9 n.10. The district court noted Section 92's omission from the U.S. Code and concluded that the statutory provision "apparently was inadvertently repealed in 1918." (OCC Pet. App. 44a n.2) Despite this conclusion, the court "assume[d] that the statute exists *in proprio vigore*." (*Id.*) Respondents noted these facts in their opening brief to

[29] Even if this Court were to grant review, there is an alternative ground for affirming the Court of Appeals' decision. Respondents argued below that the Comptroller's expansive geographic interpretation of Section 92 was arbitrary and capricious and not in accordance with law. *See supra* at 4.



the Court of Appeals. Moreover, Respondents specifically asked the Court to confront the issue of Section 92's validity. Petitioners expressly disagreed that the court should decide this issue. *See supra* n.4. Consequently, contrary to the Bank's assertion, there was a direct dispute as to whether the Court of Appeals should address the question of Section 92's validity. Having resolved this dispute in favor of addressing Section 92's validity,[30] it is difficult to perceive how the court's decision that Section 92 is not valid was "advisory."

The Bank, like Judge Silberman, relies chiefly on cases in which courts had declined to resolve issues that had not been fully briefed or argued. *See, e.g., Carducci v. Regan*, 714 F.2d 171, 172 (D.C. Cir. 1983) ("Because it was not adequately briefed or argued on appeal, we decline to resolve the further issue . . ."); *McCormick v. United States*, 111 S. Ct. 1807, 1818 (1991) (Scalia, J., concurring) ("While I do not feel justified in adopting that interpretation without briefing and argument . . . ."); *King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1986) (declining to rehear *en banc* issue that "was not briefed or argued to the panel"). *See also Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (declining to resolve an issue where "[the] petitioner has never been heard in any way on the merits").[31]

[30] At that point, the fact that the parties did not take directly adversary positions on the substantive issue was irrelevant: federal courts "are not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939). *Accord Kamen v. Kemper Financial Services, Inc.*, 111 S.Ct. 1711 (1991).

[31] The Bank's reliance on *Williams v. Zbaraz*, 448 U.S. 358, 367 (1980), is misplaced. In that case, this Court held, unremarkably, that an action attacking the validity of a state statute did not permit a federal court to rule on the constitutionality of a federal statute, although the subject matter of the two statutes was similar. Here, only one statute—a federal statute—is in controversy. The Court of Appeals did not reach out to address any other statutory provision.

But the Court of Appeals had ample opportunity to receive, and interested parties ample time to submit, legal briefing on the existence of Section 92. *See supra* n.4. By the time the panel issued its opinion, the issue had been noted by the district court, briefed by the parties, and discussed at oral argument.[32] Thus, to the extent judicial discretion is involved, it has been exercised correctly to determine whether Section 92 remains in existence. *See Arcadia, Ohio v. Ohio Power Co.*, 111 S.Ct. 415, 418 (1990). And, as the Bank apparently fails to recognize, the existence of this predicate issue counsels against plenary review. This Court's scarce resources would be wasted by taking this case in order to confront a question of whether a lower court correctly exercised discretion that it unquestionably possesses.

## CONCLUSION

For all the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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[32] Any defect was surely resolved during the proceedings before the full Court of Appeals. Petitioners filed additional briefs and an *amicus* brief was joined by fifteen banking associations representing bankers across the nation.